Jivol @ Edmund bin Doudilim v The Director General of Insolvency Malaysia

HIGH COURT (KOTA KINABALU) — ORIGINATING SUMMONS NO BKI-24NCvC-101/6 OF 2022 (HC5)
AMELATI PARNELL JC
12 OCTOBER 2022

Bankruptcy — Discharge — Conditional — Plaintiff was granted conditional discharge from bankruptcy subject to his entering into consent judgment to pay balance of debts provable in the bankruptcy by way of monthly payments of RM300 to the Director-General of Insolvency ('DGI') — Plaintiff failed to comply with repayment schedule or to notify DGI periodically of his after-acquired property or income — Whether plaintiff could not complain that DGI's records continued to list him as a bankrupt as the conditions attached to his discharge order had not been fulfilled

On 23 August 2013, the High Court granted the plaintiff a conditional discharge from bankruptcy under s 33(10) of the Bankruptcy Act 1967 (now known as the Insolvency Act 1967) by requiring him to enter into a consent judgment to pay the defendant RM363,281.17, being the balance of the debts provable in the bankruptcy which remained unsatisfied as at that date. The plaintiff was ordered to continue paying the defendant RM300 per month until the consent judgment sum was fully settled. The plaintiff contended that when he did an official search on his status on 2 September 2020, he found that he was not a bankrupt. However, ten days later, when he went to the nomination centre to file his candidacy to contest for a state seat in the Sabah State Elections, he was told by the returning officer there that he was ineligible to contest because a search done on him that day revealed that he was a bankrupt. Two further official searches done by the plaintiff thereafter confirmed that he was a bankrupt. The plaintiff filed the instant originating summons ('OS') seeking a declaration that he was not a bankrupt since 23 August 2013 and that the defendant's search results after that date stating that he was a bankrupt were null and void. The plaintiff sought an order directing the defendant to rectify its records to show that he was never a bankrupt after 23 August 2013. The plaintiff argued that since the court order granting him a conditional discharge from bankruptcy had never been set aside, there was no reason why his status should change. In reply, the defendant submitted that its records would continue to show the plaintiff as a bankrupt so long as the conditions attached to the order granting him a discharge remained unfulfilled.

Held, dismissing the OS:

(1) The bankruptcy status of an individual may change whenever there was non-compliance with any condition set forth in a discharge order made by the Bankruptcy Court. The defendant had the discretion administratively to change the bankruptcy status of the plaintiff when he defied the order dated 23 August 2013 (see paras 34–35).

(2) The plaintiff was required under r 187 of the Insolvency Rules 2017 to give the defendant from time to time such information as the defendant might require with respect to the plaintiff's after-acquired property. From 17 February 2015 to date, the plaintiff had submitted his financial statements to the defendant only for the period from January until June of 2008. No financial statement was filed by the plaintiff after that period. From 23 August 2013 onwards, the plaintiff also failed to pay the monthly installments to the defendant, hence disobeying the terms of the conditional discharge order. To date, the plaintiff had not fully settled the consent judgment sum of RM363,281.17. Because of this non-compliance with the said Order, the plaintiff was not discharged from his bankruptcy. Therefore, the information contained in the bankruptcy searches were not erroneous but displayed the true fact of the plaintiff's bankruptcy status. No rectification of the defendant's records was therefore required (see paras 29–31, 33 & 46).

(3) As the conditions in the plaintiff's conditional discharge order had not been fulfilled or fully satisfied, the defendant did not have to apply for leave to challenge the conditional discharge order in order to change the plaintiff's bankruptcy status. The conditional discharge order clearly said that the plaintiff's discharge was subject to him making monthly payments until the judgment sum of RM363,281.17 was fully settled (see paras 28 & 40).

[Bahasa Malaysia summary

Pada 23 Ogos 2013, Mahkamah Tinggi membenarkan pelepasan secara bersyarat kepada plaintif dari kebankrapan di bawah s 33(10) Akta Kebankrapan 1967 (kini dikenali sebagai Akta Insolvensi 1967) dengan syarat penghakiman persetujuan hendaklah dimasuki untuk membayar defendan sebanyak RM363,281.17, sebagai baki hutang yang boleh dibuktikan di dalam kebankrapan yang setakat tarikh tersebut. Plaintif telah diperintahkan untuk terus membayar kos sebanyak RM300 sebulan kepada defendan sehingga jumlah penghakiman persetujuan tersebut diselesaikan sepenuhnya. Plaintif berhujah bahawa apabila beliau melakukan carian rasmi mengenai statusnya pada 2 September 2020, beliau mendapati bahawa dia bukan seorang bankrap. Walau bagaimanapun, sepuluh hari kemudian, apabila beliau pergi ke pusat penamaan calon untuk memfailkan pencalonannya untuk bertanding bagi kerusi DUN pada Pilihan Raya Negeri Sabah, beliau diberitahu oleh pegawai di sana bahawa beliau tidak layak bertanding kerana hasil carian yang dilakukan ke atasnya mendedahkan bahawa beliau seorang yang bankrap. Dua

carian rasmi lanjutan yang dilakukan oleh plaintif selepas itu mengesahkan bahawa beliau adalah seorang bankrap. Plaintif memfailkan saman pemula ini ('SP') untuk memohon perisytiharan bahawa beliau bukan seorang bankrap sejak 23 Ogos 2013 dan hasil carian defendan selepas tarikh itu yang menunjukkan bahawa beliau seorang bankrap adalah terbatal dan tidak sah. Plaintif memohon perintah untuk defendan membetulkan rekodnya bagi menunjukkan bahawa beliau tidak pernah bankrap selepas 23 Ogos 2013. Plaintif menghujahkan bahawa memandangkan perintah mahkamah yang memberikannya pelepasan bersyarat daripada kebankrapan tidak pernah diketepikan, tiada sebab mengapa statusnya harus berubah. Sebagai balasan, defendan menghujahkan bahawa rekodnya akan terus menunjukkan plaintif sebagai bankrap selagi syarat-syarat yang dilampirkan pada perintah yang memberikan pelepasan kekal tidak dipenuhi.

Diputuskan, menolak SP:

(1) Status kebankrapan seseorang individu boleh berubah apabila terdapat ketidakpatuhan terhadap sebarang syarat yang dinyatakan di dalam perintah pelepasan oleh Mahkamah Kebankrapan. Defendan mempunyai budi bicara secara pentadbiran untuk menukar status kebankrapan plaintif apabila dia tidak mematuhi perintah bertarikh 23 Ogos 2013 (lihat perenggan 34–35).

(2) Plaintif harus mematuhi keperluan k 187 Kaedah-Kaedah Insolvensi 2017 untuk memberi maklumat sepanjang masa yang mungkin diperlukan oleh defendan berkenaan mengenai harta yang diperoleh plaintif. Dari 17 Februari 2015 hingga kini, plaintif telah menyerahkan penyata kewangannya kepada defendan hanya untuk tempoh dari Januari hingga Jun 2008. Tiada penyata kewangan difailkan oleh plaintif selepas tempoh itu. Pada 23 Ogos 2013, plaintif juga gagal membayar ansuran bulanan kepada defendan, justeru tidak mematuhi terma-terma di dalam perintah pelepasan bersyarat. Sehingga kini, plaintif masih belum menyelesaikan sepenuhnya jumlah penghakiman persetujuan sebanyak RM363,281.17. Oleh kerana terdapat ketidakpatuhan terhadap perintah tersebut, plaintif tidak dilepaskan daripada kebankrapannya. Oleh itu, maklumat di dalam carian kebankrapan adalah tidak salah dengan menunjukkan fakta sebenar status kebankrapan plaintif. Oleh itu, pembetulan rekod defendan adalah tidak diperlukan (lihat perenggan 29–31, 33 & 46).

(3) Memandangkan syarat-syarat di dalam perintah pelepasan bersyarat plaintif belum dipenuhi sepenuhnya, defendan tidak perlu memohon kebenaran untuk mencabar perintah pelepasan bersyarat untuk mengubah status kebankrapan plaintif. Perintah pelepasan bersyarat tersebut adalah jelas menyatakan bahawa pelepasan plaintif tertakluk kepada syarat untuk membuat bayaran bulanan sehingga jumlah

penghakiman sebanyak RM363,281.17 diselesaikan sepenuhnya (lihat perenggan 28 & 40).]

Cases referred to

Development & Commercial Bank Bhd & Ors v Loke Theen Fatt [2009] MLJU 1443, HC (distd)

Petro-Pipe Industries (M) Sdn Bhd v Fieldwork Engineering Sdn Bhd [2003] 1 MLJ 417, HC (distd)

Soh Poh Seng, Per v Ex-Parte: Malayan Banking Bhd [2018] MLJU 1186, HC (distd)

TA Securities Holdings Bhd & Anor v Ketua Pengarah Insolvensi & Ors [2020] 10 MLJ 370, HC (distd)

Legislation referred to

Insolvency Act 1967 (previously Bankruptcy Act 1967) ss 3(3), 33, 33(10), 33A, 33A(2B), 105

Bankruptcy Rules 1969 (repealed by Insolvency Rules 2017) rr 194, 201

Evidence Act 1950 s 8

Insolvency Rules 2017 r 187

Rules of Court 2012 O 45

Roland Cheng (Roland Cheng & Co) for the plaintiff.

Asri bin Nasif (Senior Insolvency Officer I, Sabah Department of Insolvency) for the defendant.

Amelati Parnell JC:

INTRODUCTION

[1] The plaintiff herein filed originating summons (encl 1) dated 28 June 2022 for the following orders:

(a) a declaration that the plaintiff is not a bankrupt after 23 August 2013;

(b) a declaration that the bankruptcy search certificate issued by the defendant dated 12 September 2020, 25 September 2020 and 3 June 2022 stating that the plaintiff is a bankrupt are null and void;

(c) an order that the defendant within 14 days from the date of this order of this court do rectify all their records so as to show that the plaintiff is no longer a bankrupt after 23 August 2013;

(d) that the cost of this application be borne by the defendant; and

(e) any further or other relief as the court deems fit to grant.

[2] The cause papers filed by parties are:

(a) originating summons dated 28 June 2022 (encl 1);

(b) affidavit in support affirmed by Jivol @ Edmund bin Doudilim, the plaintiff dated 27 June 2022 ('the plaintiff's AIS') (encl 2);

(c) affidavit in reply affirmed by Ainon bt Masri on behalf of the DGI, the defendant dated 12 July 2022 ('the DGI's AIR') (encl 3).

(d) corrective affidavit and affidavit in opposition affirmed by the plaintiff dated 19 July 2022 (the plaintiff's AIO') (encl 5); and

(e) supplementary affidavit affirmed by Jivol @ Edmund bin Doudilim, the plaintiff dated 18 August 2022 ('the plaintiff's supplementary') (encl 7).

SAILENT FACTS

[3] The plaintiff has been adjudged a bankrupt on 17 February 2005 under Bankruptcy Petition No K29–469 of 2003. He was discharged from bankruptcy with conditions under s 33(10) of the Bankruptcy Act 1967 ('the Act') by the High Court on 23 August 2013 (refer pp 1–3 exhs 'EJD-01' to 'EJD-03' of said AIS). The discharge was also published in the newspapers on 1 June 2016 (refer p 4 of exh 'EJD-04' of said AIS).

[4] After his discharge from bankruptcy, the plaintiff was able to act freely as a discharged bankrupt without any hindrances as follows:

(a) has been issued Annual Certificate to Practice by the Registrar of the High Court for the years 2019 and 2020 and by the Sabah Law Society for 2020 (refer pp 5–6 of exhs 'EJD-05 to 'EJD-06' of said AIS); and

(b) the plaintiff have since 2019 been a partner in a legal firm known as Yasambun & Co, Advocates & Solicitors.

[5] The plaintiff had conducted search ONLINE on his bankruptcy status on 2 September 2020 through the web link provided by the Malaysian Department of Insolvency (MDI). The bankruptcy search result issued by the defendant shows that the plaintiff is not a bankrupt (refer p 8 of exh 'EJD-07' of said AIS).

[6] The plaintiff was nominated and confirmed by the United Sabah National Organisation (USNO) on 10 September 2020 as its candidate for the Sabah State Election to be held on the 26 September 2020 for the State Constituency (DUN) of N 23 Petagas.

[7] During the nomination day on 12 September 2020, the plaintiff was informed by the Returning Officer that he is not eligible to contest because the bankruptcy search result dated 12 September 2020 showed that he was

purportedly a bankrupt (refer p 9 of exh 'EJD-08'. Therefore, the plaintiff was disqualified to contest the Sabah State Election on 26 September 2020 (refer pp 22–38 of exhs 'EJD-15' of said AIS).

[8] On 14 September 2020, the plaintiff had paid RM8,400 to the defendant to update his account in case his bankruptcy status was affected due to delay (if any) in payment (refer p 21 of exh 'EJD-13' of said AIS). However, the bankruptcy search result dated 25 September 2020 still showed that the plaintiff was allegedly a bankrupt (refer p 22 of exh 'EJD-14' of said AIS).

[9] On 28 September 2020, the plaintiff filed an originating summons against the defendant for the discrepancies of his bankruptcy status in the search certificates issued. However, the plaintiff's claim was dismissed because the High Court decided that the matter should be heard in the Bankruptcy Court and not in the civil court and because of the failure to state the provision of the law in the intitulement. The plaintiff then filed an appeal on 11 February 2021.

[10] On 27 May 2022, the Court of Appeal held that the conditional discharge order under s 33(10) of the Act by the High Court on 23 August 2013 is still valid and subsisting, that the originating summons was correctly filed in the civil court and the plaintiff had the liberty to re-file the originating summons in civil suit (refer to pp 4–5 of exh 'EJD-21' of said supplementary).

[11] On 3 June 2022, after the order was granted, the plaintiff has made another bankruptcy search and found out his status has not yet changed and is still wrongly stated as a bankrupt (refer to p 46 of exh 'EJD-20' of said AIS). The defendant did not file an appeal against the Court of Appeal order within one month from the date of order.

THE ISSUES

[12] The plaintiff submits that the plaintiff has prayed for three declarations relating to his discharge from his bankruptcy and the validity of the bankruptcy search results dated 2 September 2020, 12 September 2020, 25 September 2020 and 3 June 2022. The following issues arise:

(a) whether the plaintiff's discharge on 23 August 2013 by the court from Bankruptcy Petition No K29-469–2003 under s 33(10) of the Act can be subsequently revoked without leave of court?

(b) whether the bankruptcy search result dated 2 September 2020 issued by the defendant is correct and the bankruptcy search results also issued by the defendant dated 12 September 2020, 25 September 2020 and 3 June 2022 are incorrect? and

(c) whether the records of the defendant regarding the plaintiff's Bankruptcy Matter No K29–469 of 2003 should be rectified to show his non-bankruptcy status?

ANALYSIS AND FINDINGS

Whether the plaintiff's discharge on 23 August 2013 by the court from Bankruptcy Petition No K29–469 of 2003 under s 33(10) of the Act can be subsequently revoked without leave of court?

[13] It is undisputed facts that the plaintiff has been discharged from bankruptcy with conditions under s 33(10) of the Act by the court on 23 August 2013 and it was *gazetted* in the newspapers on 1 June 2016.

[14] The plaintiff content that the defendant did not file any application pursuant to r 201 of the Bankruptcy Rules 1969 to challenge the court order dated 23 August 2013. Further, the bankruptcy search certificate dated 2 September 2020 issued by the defendant shows that the plaintiff is not a bankrupt. Therefore, there is no reason in law why the plaintiff's bankruptcy status should change on 12 September 2020 and 25 September 2020.

[15] Rule 201 of the Bankruptcy Rules 1969 states that:

> (1) An application by the Official Assignee for leave to *issue execution* on a judgment under subsection (10) of section 33 shall be in writing and shall state shortly the grounds on which the application is made. When the application is lodged the Court shall fix a day for the hearing.
>
> (2) *The Official Assignee shall give notice of the application to the debtor not less than eight days before the day appointed for the hearing and shall at the same time furnish him with a copy of the application.*

[16] The plaintiff relied on the High Court case of *Development & Commercial Bank Bhd & Ors v Loke Theen Fatt* [2009] MLJU 1443 ('Loke Theen Fatt'), to show that the plaintiff herein can be discharged from bankruptcy subject to conditions for payment on the judgment for the outstanding sum.

[17] *Loke Theen Fatt*'s case was an appeal against the decision of the Deputy Registrar on 17 March 2006 which allowed the application of the respondent for discharge as a bankrupt subject to a consent judgment entered against the respondent for the balance of the respondent's debt as at the date of discharge. The application was made pursuant to s 33 of the said Act and r 194 of the Bankruptcy Rules. The respondent was adjudicated a bankrupt on 1 October 1993. Two of the five grounds of the appeal are: '(4) The Respondent had

continued to trade despite being bankrupt'; and '(5) The DGI report is flawed'.

His Lordship Datuk David Wong Dak Wah J (as he then was) dismissed the appeal and held that:

> ... As for grounds 3 and 4, they have been dealt with adequately in the DGI reports, hence no necessity for me to discuss further. As for ground 5, it had been dealt with by me earlier on. For all the reasons stated above it is my view that the Deputy Registrar's decision is a fair and just one ...

[18] In the present case, the discharge given to the plaintiff was conditional to a consent judgment for the outstanding balance. On 23 August 2013, the court had granted the order of *discharge with the following conditions*:

> He shall consent to the judgment being entered against him by the Director General of Insolvency for the sum of RM363,281.17 being the balance of the debts provable under the bankruptcy which is not satisfied at the date of this Order ... *He shall continue to pay RM300 per month to the Director General of Insolvency until the full settlement of the sum of RM363,281.17*.

[19] Reverting to the question at hand on whether leave of the court must be obtained before any changes be made to the bankruptcy status, the defendant submits that there is no such necessity to do so because leave of court is only required for execution of the consent order.

[20] Here the conditional discharge of the plaintiff was made under s 33(10) of the Act which read as follows:

> (10) The court may, as one of the conditions referred to in this section, requires the bankrupt to consent to judgment being entered against him by the Director General of Insolvency for any balance, or part of the balance, of the debts provable under the bankruptcy which is not satisfied at the date of his discharge; but in such case execution shall not be issued on the judgment without leave of the court, which leave may be given on proof that the bankrupt has since his discharge acquired property or income available for payment of his debts.

[21] I am with the defendant that 'Execution' under s 33(10) of the Act means execution against the consent judgment entered between the DGI and the bankrupt which is the plaintiff in the case at hands. In order to execute this consent judgment, the DGI may resort to the modes provided under O 45 of the Rules of Court 2012 in relation to enforcement of judgment and orders. Hence, prior to the execution, as per s 33(10) of the Act, the leave of court must be obtained.

[22] The defendant further referred to the book *Janab's Key to Civil Procedure*, where author Datuk Dr Hamid Sultan Abu Backer has explained on

the meaning of execution, which reproduced herewith:

> The term execution and enforcement are interchangeable words. It refers to the manner in which a litigant can compel the obedience of the judgment or order against the other party. The word execution is normally used in a restrictive sense to denote the enforcement of judgment or order by way of writs execution, such as writ of seizure and sale (*fieri facias*), writ of possessions and writ of delivery.

[23] With reference to *r 201* of the Bankruptcy Rules 1969, it explains on the need of the DGI to apply for leave to issue execution under sub-s 33(10) of the Act whereas in the present case, such issue does not arise.

[24] As submitted by the defendant the issue raised in the present case is what would be the bankruptcy status of the plaintiff when he has yet to fulfil the conditions of the said order, in which the defendant submitted, shall remain 'bankrupt' until the plaintiff has fulfilled all the conditions stipulated in the said order. There is no issue of execution or enforcement of such judgment by the DGI. The plaintiff must differentiate the power of DGI to enforce the condition laid down in the consent judgment made under s 33(10) of the Act with the bankruptcy status of a bankrupt when the bankrupt himself fails to comply with any condition in the consent judgment that he has entered with the DGI.

[25] Coming back to *Loke Theen Fatt*'s case cited by the plaintiff, the defendant had rightly pointed out what His Lordship Datuk David Wong Dak (as he then was) said at para [8] about the issue of 'leave to issue execution', as below:

> In any event the discharge given by the deputy registrar is conditional to a consent judgment for the balance outstanding. What that means is that execution cannot be issued on the consent judgment without leave of the court and *leave will be granted only if after the discharge the respondent had acquired property or income available for payments of his debts*. With this conditional discharge the appellants in my view had not been prejudiced in any way at all.

[26] In the present case, the defendant submits that the question of execution does not arise and the DGI has not yet taken any position to enforce the condition in the said order, although it is capable to do so. Hence, r 201 of the Bankruptcy Rules 1969, is not in any way relevant to be applied in the present case.

[27] I am with the defendant that the facts in the present case must be distinguished with the case of *Loke Theen Fatt*'s case as in that case, the appeal made was in relation to the discharge of the respondent in which the appellants contended that there were several grounds which made it inappropriate for the

respondent to be granted with a discharge. Meanwhile, in this matter at hands, the issue raised is in relation to the non-compliance of the consent judgment made under s 33(10) of Act by the plaintiff which amounted to change in his bankruptcy status.

[28] As the conditions in the conditional discharge order has not been fulfilled or fully satisfied, I am inclined to agree with the defendant that r 201 does not compel the DGI to file any application or leave to challenge the court order dated 23 August 2013 in order to change the status of plaintiff's bankruptcy.

Whether the bankruptcy search result dated 2 September 2020 issued by the defendant is correct and the bankruptcy search results also issued by the defendant dated 12 September 2020, 25 September 2020 and 3 June 2022 are incorrect?

[29] As deposed in DGI's AIR, the plaintiff is still subject to the conditions and it shall be his duty to give the DGI from time to time such information as the DGI may require with respect to his after-acquired property.

[30] Rule 187 of the Insolvency Rules 2017 states that:

> 187 Notice of after-acquired property to Director General of Insolvency
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> When a bankrupt is discharged subject to the condition that judgment shall be entered against him under section 33 of the Act or subject to any other condition as to his after-acquired property it shall be his duty until such judgment or condition is satisfied from time to time to give the Director General of Insolvency such information as he may require with respect to his after acquired property and not less than once a year to file in the court a statement showing the particulars of any property or income he may have acquired ...

[31] From 17 February 2015 to date, the plaintiff had only submitted his financial statements to the DGI for the period of January 2008 until the month of June of the same year. No financial statement was filed by the plaintiff after that period. It is pertinent to note that from 23 August 2013 onwards, the plaintiff also fails to pay the monthly instalment to the DGI, hence disobeying the said order. To date, the plaintiff has not paid the full settlement of the sum of RM363,281.77 as clearly stipulated in the order. Hence, this amounts to the non-compliance of the said order and because of the non-compliance of the said order, the plaintiff is not discharged from his bankruptcy.

[32] Notwithstanding that the plaintiff can renew his Practice Certificate prior to year 2021, he become discharge only if the full sum of RM363,281.17 satisfied.

[33] Therefore, the information contained in the bankruptcy search and the search certificate is not erroneous but only displays the true fact of the plaintiff's present bankruptcy status.

[34] The bankruptcy status of an individual may change whenever there is non-compliance of any condition set forth in a discharge order made by the Bankruptcy Court.

[35] The DGI has the discretion administratively to change the bankruptcy status of the plaintiff when the plaintiff defied the said order dated 23 August 2013.

[36] Based on the tables provided in para 16 of the DGI's AIR dated 20 October 2020, the plaintiff clearly had made some payments for what supposed to be the monthly instalment as stipulated in the said order.

[37] This as submitted by the defendant irresistibly shows the admission on the part of the plaintiff that he is an undischarged bankrupt. Furthermore, his conduct in making those payments shows that he has the knowledge that he still has to submit to the said order by paying the required sum as set out in the same.

[38] This evidence of conduct is relevant under s 8 of the Evidence 1950 which is as follows:

> 8 *Motive, preparation and previous or subsequent conduct*
>
> (1) Any facts is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.
>
> (2) *The conduct of any party*, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or *in reference to any fact in issue therein or relevant thereto*, and the conduct of any person an offence against whom is the subject of any proceeding, *is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.*

[39] As reiterate by the defendant, the fact in the present case, the main issue that was raised by the plaintiff is in relation to the plaintiff's bankruptcy status which was after the stages of petition of bankruptcy and receiving order and the adjudication order. The case of *Petro-Pipe Industries (M) Sdn Bhd v Fieldwork Engineering Sdn Bhd* [2003] 1 MLJ 417 referred by the plaintiff revolved around the issue of interpretation of the advertisement of winding-up petition and should be distinguished with the facts and issue in the present case.

[40] Meanwhile, the case of *TA Securities Holdings Bhd & Anor v Ketua*

Pengarah Insolvensi & Ors [2020] 10 MLJ 370 (as cited by the plaintiff) discuss on provision under s 3(3) of the Insolvency Act 1967 and s 33A of the Act in which the plaintiff had challenged the DGI's decision to discharge the bankrupt under s 33A(2B) by way of certiorari and it has nothing to do with non-compliance of s 33(10). The DGI in the present case is not challenging the order of the court but instead the DGI is enforcing the court's order which clearly says that discharge of the bankrupt shall subject to monthly payment until full settlement of RM363,281.17.

[41] The plaintiff being a practicing advocate and solicitor should be well versed of his bankruptcy status and the contents of the said order. The plaintiff has all means to be cautious and vigilant in making sure his bankruptcy status is cleared before deciding to participate in the Sabah State Election.

Whether the records of the defendant regarding the plaintiff's Bankruptcy Matter No K29–469 of 2003 should be rectified to show his non-bankruptcy status?

[42] On 27 May 2022, the Court of Appeal ordered among others that the previous plaintiff's application dated 28 September 2020 is defective for failure to state the relevant provision of law in the intitulement as regard to the plaintiff status. It is the defendant's submission that there is nothing here for the DGI to rectify on the plaintiff's status in view that there are no Court of Appeal's declarations on the non-bankruptcy status of the plaintiff. Therefore, a fresh suit filed by the plaintiff in the present case.

[43] The Court of Appeal has stated that the conditional discharge order dated 23 August 2013 is valid and subsisting. The DGI in the present case is not challenging the order of the court but instead the DGI is enforcing the court's order which clearly says that discharge of the bankrupt shall subject to monthly payment until full settlement of RM363,281.17.

[44] The case of *Per: Soh Poh Seng v Ex-Parte: Malayan Banking Bhd* [2018] MLJU 1186 as illustrated by the plaintiff again has no room to be considered by this court. The case cited focused on issue of solvency of the judgment debtor at the time when the bankruptcy order made against him. In that case the judgment debtor filed an application under s 105 of the Insolvency Act to rectify his status as he is ought not to be adjudged a bankrupt at the time when the bankruptcy order made. Such application is of different nature with s 33 or 33(10) of the said Act.

[45] As reiterate above, 'Execution' under s 33(10) of the Act means execution against the consent judgment entered between the DGI and the bankrupt which is the plaintiff in the case at hands. In order to execute this consent judgment, the DGI may resort to the modes provided under O 45 of

the Rules of Court 2012 in relation to enforcement of judgment and orders. Hence, prior to the execution, as per s 33(10) of the Act, the leave of court must be obtained.

[46] Hence, the bankruptcy status of the plaintiff should not be rectified to show his non-bankruptcy status.

CONCLUSION

[47] The plaintiff's discharge was made pursuant to s 33(10) of the Act, hence the plaintiff's discharge is conditional and he still has to report to the DGI any information whatsoever pertaining to his properties, in addition to the monthly payment that he has to make as mandated in the said order.

[48] Considering the issues at hand and for the reasons stated above, it is my findings that there is no leave of court required to change bankruptcy status of the plaintiff because leave of court is only required for execution of the consent order. Such issue does not arise.

[49] The DGI in the present case is not challenging the order of the court but instead the DGI is enforcing the court's order which clearly says that discharge of the bankrupt shall subject to monthly payment until full settlement of RM363,281.17.

[50] Therefore the bankruptcy search and the search certificates are not erroneous but only display the true fact of the plaintiff's present bankruptcy status.

[51] Accordingly, the plaintiff's OS is dismissed with cost of RM4,000 subject to payment of allocator fee.

OS dismissed.

Reported by Ashok Kumar